No. 75-1773

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DESERT OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Acting by and through The Department of Transportation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

LEWIS & KROLL
By: DAVID K. KROLL
1010 Second Avenue
Suite 1401
San Diego, California 92101
Telephone: (714) 239-1131
Attorneys for Petitioner

SUBJECT INDEX

	Page
OPINION BELOW	1,2
JURISDICTION	2
QUESTIONS PRESENTED	2,3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4,5,6,7,8, 9,10
HOW FEDERAL QUESTIONS ARE PRESENTED	10,11
REASONS FOR GRANTING THE WRIT:	
I	11,12,13,14
II	15
III	15,16
CONCLUSION	17
APPENDICES:	
APPENDIX A Opinion of the Court of Appeal	A-1
APPENDIX B "Highway Beautification Act of 1965"	B-1
APPENDIX C Business and Professions Code of the State of California	C-1

SUBJECT INDEX (Continued)

TABLE OF AUTHORITIES CITED

Cases

	Page
State of Vermont v. Brinegar, 379 F.Supp. 606 (1974)	14,15

CONSTITUTIONAL PROVISIONS

United States Constitution, 14th Amendment, Section 1	4

CODES

California Business and Professions Code,	
§§ 5200 et seq.	5
§ 5405	5
§ 5405(a)	4
§ 5410	5,6
§ 5412	4,5,6,9
§ 5417	4,6,9,10,11

FEDERAL STATUTES

Title 23 United States Code, §131	2
Section 131(a)	4
Section 131(b)	4,5,14,15

SUBJECT INDEX (Continued)

FEDERAL STATUTES - Continued

	Page
Section 131(c)	4
Section 131(d)	4
Section 131(e)	4
Section 131(g)	4,6,9
Section 131(n)	4,5,9,10,11, 12,13,15
Title 28 United States Code,	
Section 1257(3)	2

OTHER AUTHORITIES

42 Opinion of United States Attorney General 26 (1966)	14
55 Opinion of California Attorney General 1, No. 71-102 (1972)	14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No._____

DESERT OUTDOOR ADVERTISING, INC.,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through THE DEPARTMENT OF TRANSPORTATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, entered January 15, 1976.

OPINION BELOW

The opinion by the Court of Appeal of

California appears in Appendix A.

JURISDICTION

On December 19, 1974 the Superior Court of Riverside County, California, entered a summary judgment granting a mandatory injunction and ordering immediate removal of fifty-two (52) of Petitioner's outdoor advertising displays. Said summary judgment was affirmed by the Court of Appeal of California, Fourth Appellate District, Division Two on January 15, 1976, and a Petition for Rehearing to that court was denied on February 2, 1976. A Petition for Hearing to the Supreme Court of the State of California was denied on March 10, 1976, and this Petition for Certiorari is being filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) WHETHER REMOVAL OF OUTDOOR ADVERTISING DISPLAYS UNDER SECTION 131 OF TITLE 23 U.S.C. CONSTITUTES A "TAKING"

OF PROPERTY IN THE NATURE OF EMINENT DOMAIN, OR IS MERELY THE EXERCISE OF POLICE POWER FOR WHICH NO CONSTITUTIONAL PROTECTIONS APPLY.

(2) WHETHER SECTION 131(n) OF TITLE 23 U.S.C.A. REQUIRES THAT NO OUTDOOR ADVERTISING DISPLAY CAN LEGALLY BE REMOVED UNDER THE FEDERAL HIGHWAY BEAUTIFICATION ACT WITHOUT THE FEDERAL 75% SHARE OF COMPENSATION HAVING FIRST BEEN ALLOCATED BY THE FEDERAL GOVERNMENT AND MADE IMMEDIATELY AVAILABLE TO THE CALIFORNIA DEPARTMENT OF TRANSPORTATION.

(3) WHETHER PETITIONER IS BEING DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW WHEN A TRIAL COURT GRANTS A SUMMARY JUDGMENT REQUIRING IMMEDIATE REMOVAL OF FIFTY-TWO (52) OF PETITIONER'S ADVERTISING DISPLAY STRUCTURES WHEN THE SUMMARY JUDGMENT IS BASED UPON AN AFFIDAVIT FILED AND SERVED BY THE STATE ON THE MORNING OF THE SUMMARY JUDGMENT HEARING AND PETITIONER IS DENIED ANY OPPORTUNITY TO CONTROVERT THE ALLEGATIONS OF THE AFFIDAVIT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 14th Amendment to the Constitution of the United States.

> "No state shall ...deprive any person of life, liberty or property without due process of law;"

2. Sections 131(b), 131(c), 131(d), 131(e), 131(g), and 131(n) of Title 23 U.S.C. (the Federal Highway Beautification Act) are set forth as Appendix B.

3. Sections 5405(a), 5412, and 5417 of the California Business and Professions Code are set forth as Appendix C.

STATEMENT OF THE CASE

In 1965 the Federal government enacted the Federal Highway Beautification Act (Title 23, §§131(a) through 131(n)), calling for eventual removal of specified outdoor advertising displays located adjacent to Federal-aid Interstate and primary highways. Section 131(g) provides that "just compensation shall be paid upon the removal of ...outdoor advertising ...displays" ...under the Act, and that,

"the Federal Share of such compensation shall be 75 per centum." "Such compensation shall be paid for the following:

"(A) The taking from the owner of such ...display...of all right, title, leasehold and interest in such ...display; and (B) The taking from the owner of real property on which the ...display ...is located of the right to erect and maintain such ...displays...thereon." Section 131(b) provides that the States shall provide for effective control of such outdoor advertising displays in conformity with the Federal Act on pain of reduction of 10% of the Federal highway funds. Section 131(n) provides that, "No ...display...shall be required to be removed under this section if the Federal Share of the just compensation to be paid upon removal of such ...display...is not available to make such payment."

In 1967, the State of California enacted laws to conform with the Federal Act, by amending its Outdoor Advertising Act at Sections 5200 et seq of the California Business and Professions Code. Sections 5405 and 5410 provide for the removal of such non-conforming displays, and Section 5412 provides for compensation

in accordance with the Federal Act. Section 5417 provides as follows:

> "If compensation is required by federal law, as described in the last paragraph of Section 5412, no advertising display shall be required to be removed purusant to Section 5410 unless and until federal funds for the federal share of compensation therefor, to wit, 75 percent, required by subdivision (g) of Section 131 of Title 23 of the United States Code have been appropriated by the federal government and made immediately available to the director and notification of such appropriation and immediate availability has been received by the director. This section shall not apply to the removal of any advertising display for which no federal share is payable."

Petitioner DESERT OUTDOOR ADVERTISING, INC. is the owner of fifty-two (52) outdoor advertising displays located in

Riverside County, California, all of which are subject to removal under the Federal and State acts, and for which compensation must be paid. In November 1973, Respondent DEPARTMENT OF PUBLIC WORKS of the STATE of CALIFORNIA brought an action in the Superior Court of Riverside County alleging that all 52 displays were in violation of a county ordinance and the State Act and were public nuisances, and that all 52 should be ordered immediately removed without the payment of any compensation. Petitioner answered, denying any illegality and demanding compensation if the displays were to be removed under the Federal Act.

Respondent filed its first motion for summary judgment seeking removal of all displays without compensation. The motion was denied, except that the trial court held that all 52 displays were established as being "non-conforming" and subject to removal under the Federal and State acts. Respondent then filed its second motion for summary judgment, again requesting removal of all 52 displays without compensation. Petitioner filed lengthy points and authorities in opposition, urging among other defenses

that the Federal government had not appropriated nor made available to the State of California sufficient funds to pay for the 75% share of compensation for the displays which the State was then seeking to remove. Then, on the very morning of the hearing of that motion, Respondent filed with the court and handed to Petitioner an affidavit alleging that the State did have available a total of $487, 546.00 of Federal Funds. which was allegedly "...available for the Federal share of payment of just compensation upon the removal of the billboards which are the subject of this action." Previous answers to interrogatories had made it clear that the State had not allocated any specific portion of those funds for the payment of Petitioner's displays out of the more than two-thousand (2000) displays throughout the State, also subject to removal and payment of compensation. Petitioner therefore orally denied that the allegations of the affidavit were true, and requested a continuance to have the opportunity to controvert those allegations. The trial court denied the request for continuance and granted the motion for

summary judgment ordering immediate removal of all 52 displays. Upon Respondent's abandoning in open court its contention that no compensation be paid, the court did order that compensation ultimately be paid to Petitioner.

Petitioner appealed to the Court of Appeal of California, urging that Section 131(n) of the Federal Act and Section 5417 of the State Act specifically prohibited removal of displays until the Federal share of compensation was allocated and available to the State for each of the displays the State then sought to remove. Petitioner further urged that it had been denied a fair hearing in that the trial court did not permit Petitioner an opportunity to controvert the last minute affidavit filed by Respondent, and that the affidavit was misleading and untrue.

The Court of Appeal affirmed the summary judgment on the ground that the fifty-two (52) displays are subject to removal under the State "police power", and are "public nuisances" ... "subject to abatement by injunctive process", and that removal under Section 5412 of the State Act and Section 131(g) of the

Federal Act was "not a taking under the power of eminent domain." In answer to Petitioner's argument that Section 131(n) of the Federal Act and Section 5417 of the State Act prohibited removal of displays before allocation of Federal funds to pay for them, the court merely stated that Section 5417 doesn't require that the State set aside a "specific fund" for Petitioner's displays. Despite Petitioner's request for rehearing in which Petitioner urged at length that the court had failed to construe or even discuss Sections 5417 and 131(n), the court of appeal decision is completely silent on the matter.

HOW FEDERAL QUESTIONS ARE PRESENTED

Since the judgment herein is a summary judgment, no trial on the merits was held. Petitioner raised the issues of Section 5417 of the State Act and its co-relative Section 131(n) of the Federal Act in its appeal and briefs to the Court of Appeal, its petition for rehearing to that Court and in its petition for hearing to the California Supreme Court. The issue of denial of due process by denying

Petitioner the right to refute Respondent's eleventh-hour affidavit has also been raised at every level of appeal. All issues are presented at length in Petitioner's petition for hearing to the California Supreme Court.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW IS IN DIRECT VIOLATION OF SECTION 131(n) OF TITLE 23. THIS IS A CASE OF FIRST IMPRESSION, AND A DECISION CONSTRUING SECTION 131(n) WOULD HAVE NATIONWIDE IMPORTANCE AS TO MANY THOUSANDS OF DISPLAYS.

The manifest purpose of Section 131(n) of the Federal Act and Section 5417 of the State Act is to prohibit the removal of any display until the federal 75% share of compensation for that display has been allocated by the federal government and made immediately available to the state for payment to the display owners. Indeed, no other construction or interpretation is possible. Respondent has not suggested any other purpose or meaning,

and the Court of Appeal has supplied none. The judgment in this action, however, commands removal of Petitioner's 52 displays in direct violation and contravention of Section 131(n).

Respondent is attempting to circumvent Section 131(n) by the stratagem of taking the meager amount of funds which have been allocated by the federal government and alleging that those same funds are "immediately available for payment" in each and every case of the more than two-thousand (2000) displays which are now subject to removal in California. Respondent has admitted that each of Petitioner's displays has a minimum value of approximately $4,500.00, and Petitioner contends that their value is at least double that figure. Using Respondent's own figures as a basis, the 2000 displays in California now subject to removal will require compensation of $9,000,000. of which the 75% federal share amounts to $6,750,000.00. Yet, Respondent alleges that the total of $487,546.00 in federal funds available to the State is somehow "immediately available for payment" to Petitioner and to every other display owner in the State.

If such a scheme is permitted to succeed, the entire purpose of Section 131(n) will be completely thwarted. The Federal Act which authorizes removal of displays only as and when compensation has been allocated will have been made an instrument of wholesale instant removal of displays regardless of the availability of funds to compensate the owners. Application of this principle on a nationwide basis would thwart the very purposes and ideals which are essential to the Federal Act.

To make the injustice even more acute, the Court of Appeal has upheld the order for immediate removal on the completely erroneous ground that the displays are "nuisances" under the State and Federal Acts, and are thus subject to immediate abatement under the police power without reference to compensation or allocation of federal funds. Thus, despite the clear and unequivocal requirement by the Federal Act that all removals under the Act shall constitute a "taking" for which "just compensation" must be paid, the Court of Appeal in this decision negates the entire statutory plan and strips away all protections

supplied by the Act.

The following is direct authority that "takings" under the federal act are in the nature of eminent domain, and are not an exercise of the police power:

State of Vermont v. Brinegar, 379 F.Supp. 606 (1974)

42 Opinions of United States Attorney General 26 (1966)

55 Opinions of California Attorney General 1, No. 71-102 (1972)

The Brinegar case holds that Vermont could not remove displays under its police power without compensation following enactment of the Federal Act, despite the fact that Vermont could have removed all of the displays in the state under its police power prior to enactment of the Federal Act. The opinions of the two attorneys general both conclude that the legislative history and wording of the Federal Act require compensation in the nature of eminent domain and that utilization of police power removals would endanger the loss of 10% of federal highway funds under Section 131(b).

II

IF CALIFORNIA IS IN VIOLATION OF SECTION 131(n), THE STATE WOULD STAND TO LOSE 10% OF ITS FEDERAL HIGHWAY REVENUES, AT STAGGERING COST TO THE CITIZENS OF CALIFORNIA.

Section 131(b) of the Federal Act requires a 10% reduction in federal highway funds if a State removes displays in contravention of the Act. In the case of State of Vermont v. Brinegar, 379 F. Supp. 606 (1974) the federal district court upheld the 10% reduction in Vermont's funds when that State took the position that it could remove displays under its police power without compensation when the Federal Act provided for compensation. Accordingly, the State of Calfornia stands to lose 10% of its federal highway funds if it causes the removal of displays in contravention of Section 131(n). A decision by this Supreme Court prior to the actual removal of the displays would clarify the law and avert the potential loss to the citizens of California.

III

PETITIONER HAS BEEN DENIED A HEARING ON A CENTRAL ISSUE, AND IS BEING DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It is elemental to the concept of due

process of law that a party be given an opportunity to present its case before a judgment can be entered against it. In the instant case, Petitioner has no trial, and was the victim of a summary judgment in which the opposing party prevailed on the basis of an affidavit first filed and received at the very hearing itself. Petitioner was not permitted to controvert the mis-statements contained in the affidavit, and the trial court denied Petitioner's request for a continuance. Although the trial court relied on the affidavit in entering its judgment, the Court of Appeal held that the affidavit was irrelevant because the displays were "nuisances" under the Federal and State Acts and were subject to abatement without reference to Respondent's affidavit or Petitioner's possible refutation of it. Thus, the Court of Appeal's error in holding that the removals under the Federal and State Acts were an exercise of the police power rather than "takings" in the nature of eminent domain was doubly damaging. The court's decision that the displays were nuisances served as a sword with which the court destroyed all of the rights and protections guaranteed by the Constitution and the Federal Act. It further served as a means of ignoring the obvious denial of due process by the trial court.

CONCLUSION

Petitioner urges that certiorari be granted and the decisions of the Court of Appeal of California and the Superior Court of Riverside County be reversed.

Respectfully Submitted,
LEWIS & KROLL

by David K Kroll

Attorneys for Petitioner

APPENDIX A

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Acting by and through the Department of Transportation,	)	
Plaintiff and Respondent,	)	4 Civil 15095 (Sup.Ct.105926)
vs.	)	
DESERT OUTDOOR ADVERTISING, INC., a Corporation, et al.,	)	OPINION
Defendants and Appellants.	)	

APPEAL from the Superior Court of Riverside County. John Neblett, Judge. Affirmed.

Lewis & Kroll by David K. Kroll for Defendants and Appellants.

Harry S. Fenton, Chief Counsel, Emerson Rhyner, Deputy Chief Counsel, and Stephen A. Mason for Plaintiff and Respondent.

A summary judgment was entered which ordered the defendants to remove nonconforming

billboards and established defendants' right to payment of compensation after the billboards were removed. Each of the billboards was nonconforming and subject to removal. The respondent concedes that the defendants are entitled to payment of compensation for the removal of these billboards.

It was established without contradiction that each of defendants' billboards was within 660 feet of the edge of the right-of-way of a penalty segment of the highway. It was further stipulated that the highway in question is a penalty segment,[1/] that the copy of each billboard was visible from that highway and none of the billboards were in a business area. The Outdoor Advertising Act (Business and Professions Code, §§ 5200 et seq., specifically Business and Professions Code, § 5405) prohibits the placing or maintenance of such billboards. Section 5410 provides that billboards which were in existence on November 8, 1967 (defendant's billboards) should not be required to be removed until July 1, 1970. Section 5461 provides that all such billboards are public nuisances.

1/ "'Penalty segment' means any segment of a highway located in this state which was not covered by the Federal Aid Highway Act of 1958 and the Collier-Z'berg Act but which is covered by the Highway Beautification Act of 1965, namely, any segment of an interstate highway which is constructed upon right-of-way, any part of the width of which was acquired prior to July 1, 1956, and any segment of a primary highway."

Therefore, by statute, each of the defendants' billboards failed to comply with the provisions of the Outdoor Advertising Act on November 8, 1967 and at all times thereafter, and each was subject to removal after July 1, 1970. Under People ex rel. Dept. Pub. Wks. v. Adco Advertisers, 35 Cal.App. 3d 507, each of the billboards in this case was a public nuisance as a matter of law subject to abatement by injunctive process.

However, defendants contend that Business and Professions, §§ 5413 and 5414 are unconstitutional insofar as they allow payment of compensation after removal of the billboards. These sections provide that a removal should be deemed a taking and that compensation shall be paid after removal is completed. The judgment below provides that the defendants are entitled to payment after removal of the billboards. Defendants contend that these provisions amount to the taking of private property for public use for which just compensation must be paid before removal.

The removal provisions of the Outdoor Advertising Act are a valid exercise of the police power of the state, not a taking under the power of eminent domain. In considering the Outdoor Advertising Act, the court in Adco pointed out that the Act constituted a valid exercise of the police power of the state and

said, "'Regulations regarding and restrictions upon the use of property in an exercise of the police power for an authorized purpose, do not constitute the taking of property without compensation or give rise to constitutional cause for complaint.'" (Adco, supra, at p. 512.)

Defendants' arguments in this case are identical to those made in Adco, supra, and rejected by that court. We concur in Adco's determination that Business and Professions Code, §§ 5413 and 5414, do not violate the defendants' constitutional rights.[2/]

The trial court correctly determined that defendants' billboards failed to conform under the Outdoor Advertising Act as of November 8, 1967, and at all times thereafter, and were subject to removal after July 1, 1970.

Defendants, nevertheless, contend that they have a constitutional right to payment of compensation prior to the removal of the

---

2/ Since this legislation may be upheld on the basis of a valid exercise of police power, considerations of the conservation of judicial resources persuade us that nothing is to be gained by an exploration of the Attorney General's contention that the defendants had no property right to use public highways for outdoor advertising purposes, i.e., that offsite advertising is a mere privilege and a license, not a property right entitled to constitutional protection.

billboards. Their argument in this respect comes under an eminent domain rationale. They do have the right to payment, under Business and Professions Code, § 5412, which provides that the owner of such advertising shall be paid "just compensation." Sections 5413 and 5414, supra, provide for the procedure for obtaining such payment. Since there is no constitutional right to payment before removal, the administrative and judicial procedure established by those sections appears fair and reasonable.[3/]

3/ Business and Professions Code, §5413 reads: "The compensation required by Section 5412 shall be paid to the person or persons entitled thereto upon filing of a written claim with the director containing such information as the director may reasonably require. The claim for compensation must be filed within 180 days after removal is completed."

Business and Professions Code, §5414 reads: "If the director and a person who has presented a claim under Section 5413 do not reach an agreement as to whether compensation is payable under Section 5412 or as to the amount of such compensation within 120 days after the filing of such a claim, the claimant may institute an action at law to have his right to such compensation and the amount of such compensation determined. Such an action shall be instituted by the filing of the complaint in the superior court for the county in which the advertising display and the real property are located. The complaint shall be filed not less than one year after the filing with the director of the claim for compensation. Such an action shall be treated in accordance with Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure."

Defendants next contend that section 5417 requires the state to prove (1) that funds are in an amount based on a judicial determination of compensation made prior to removal have been appropriated by the federal government, and (2) that these funds be set aside specifically for its benefit. Under this contention, the defendants want their funds specifically set aside and not put into a pool with funds available to other billboard owners throughout the state. The obvious answer to this contention is that Business and Professions Code, § 5417, does not so provide. That section says: "If compensation is required by federal law, as described in the last paragraph of Section 5412, no advertising display shall be required to be removed pursuant to Section 5410 unless and until federal funds for the federal share of compensation therefor, to wit, 75 percent, required by subdivision (g) of Section 131 of Title 23 of the United States Code have been appropriated by the federal government and made immediately available to the director and notification of such appropriation and immediate availability has been received by the director. This section shall not apply to the removal of any advertising display for which no federal share is payable."

We presume the section means what it says. It simply does not provide for a specially designated fund in a specific amount

to be set aside for this defendants' billboards.

Defendants next contend that the trial court erred when it did not grant their request for a continuance. This motion was made after the hearing of the motion for summary judgment. No affidavits were filed in opposition to the motion, but after the filing of a motion by the People on the morning of the hearing, the defendants requested a continuance. This was denied. In view of the fact that the only facts which he subsequently attempted to explore where other federal funds had been specifically set aside, which issue is irrelevant, there was no prejudice to the defendants by the denial of the motion for a continuance.

Defendants' last contention is that the judgment for injunction should be reversed for failure of proof. This contention is without merit. The proof was inadequate. The controlling facts were not disputed; the billboards existed in violation of law; each was a public nuisance as a matter of law and subject to removal.

Judgment affirmed.

/s/Gardner
P.J.

We concur.

/s/ Tamura
J.

/s/ Hilliard
J. Pro Tem*

* Retired Judge of the Superior Court, assigned by the Chairman of the Judicial Council.

APPENDIX B

"HIGHWAY BEAUTIFICATION ACT OF 1965

For Legislative History of Act, see p. 3710

PUBLIC LAW 89-285; STAT. 1028

[S. 2084]

An act to provide for scenic development and road beautification of the Federal-aid highway systems.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE 1

Sec. 101. Section 131 of title 28, United States Code, [2] is revised to read as follows:

'§ 131. Control of outdoor advertising

'(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

'(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control

2. 23 U.S.C.A. §131.

of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the hearest edge of the right-of-way and visible from the main traveled way of the system, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such state under Section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

'(c) Effective control means that after January 1, 1968, such signs, displays, and devices shall, pursuant to this section, be limited to (1) directional and other official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning the lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, and (3) signs, displays, and devices advertising activities conducted on the property on which they are located.

'(d) In order to promote the reasonable, orderly, and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by

agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

'(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

'(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

'(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices –

'(1) those lawfully in existence on the date of enactment of this subsection,

'(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and

'(3) those lawfully erected on or after January 1, 1968.

The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

'(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

'(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

'(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

'(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit informational directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable.

'(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs,

displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement or the control required by this section, whichever control is stricter. Such payment shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

'(k) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

'(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on

such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

'(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, and not to exceed $20,000,000 for the fiscal year ending June 30, 1967. No part of the Highway Trust Fund shall be available to carry out this section.'

'(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment."
(Added Aug. 23, 1968, Pub. Law 90-495)

APPENDIX C

Business and Professions Code of the State of California

Section 5405(a)

"Notwithstanding any other provision of this chapter, no advertising display shall be placed or maintained within 660 feet from the edge of the right-of-way of, and the copy of which is visible from any interstate or primary highway, and no advertising display shall be placed or maintained beyond 660 feet from the edge of the right-of-way if the advertising display is designed to be viewed primarily by persons traveling on any interstate of primary highway, other than the following:

Section 5412: Compensation of owners required to remove displays under federal law.

"Each removal ordered by the director, on or after November 8, 1967, of any of the following advertising displays which is not as of that date in conformity with the provisions of this article shall be deemed a removal under Section 5410 and shall be deemed to constitute a taking, within the meaning of the Highway Beautification Act of 1965, subdivision (g) of Section 131 of Title 23 of the United States Code, as in effect October 22, 1965, of all right, title and interest, including any leasehold interest, of the owner of the advertising display and the right of the owner of the real property on which the advertising display is located to erect and maintain such advertising display thereon:

(a)Advertising displays lawfully in existence on October 22, 1965.

(b) Advertising displays on real property adjoining a highway made an interstate highway or a primary highway between October 21, 1965, and January 1, 1968, which were lawfully in existence on the date the highway was so classified.

(c) Signs lawfully in existence on, or lawfully erected on or after January 1, 1968.

"If federal law requires the states to pay just compensation with regard to the removal, on or after July 1, 1970, or the end of the fifth year after an advertising display becomes nonconforming, as the case may be, of such advertising displays, owneres of such advertising displays which are removed pursuant to this article or owners of the land upon which such displays are located, or both, whichever way the federal law is interpreted, shall be paid just compensation. The sole intent of the Legislature in enacting this paragraph is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers relating to the removal of advertising displays under the police power.

Section 5417: Removal of displays not required prior to appropriation and receipt of federal funds.

"If compensation is required by federal law, as described in the last paragraph of Section 5412, no advertising display shall be required to be removed pursuant to Section 5410 unless and until federal funds for the federal share of compensation therefor, to wit, 75 percent, required by subdivision (g) of Section 131 of Title 23 of the United States Code have been appropriated by the federal government and made immediately available to the director and notification of such appropriation and immediate availability has been received by the director. This section shall not apply to the removal of any advertising display for which no federal share is payable.

NO. 75-1773

Supreme Court, U. S.
FILED
JUL 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DESERT OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Transportation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

HARRY S. FENTON, Chief Counsel
EMERSON RHYNER, Deputy Chief Counsel
STEPHEN A. MASON, RONALD W. BEALS
BY: STEPHEN A. MASON
Attorneys for Department of Transportation
1120 N Street, P. O. Box 1438
Sacramento, California 95807
Telephone: (916) 445-6855
Attorneys for Respondent

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT . .	10
I THE STATE COURT JUDGMENT DID NOT DECIDE A SUBSTANTIAL FEDERAL QUESTION	10
II THE SUMMARY JUDGMENT WAS A DETERMINATION ON THE MERITS AND PETITIONER WAS NOT DENIED DUE PROCESS OF LAW	21
CONCLUSION	24

TABLE OF AUTHORITIES CITED

CASES

Art Neon Co. v. City and County of Denver, 488 F.2d 118 (1973)	18,19
D.C. Federation of Civil Association, Inc. v. Airis, 129 U.S. App. D.C. 125, 391 F.2d 478 (1968)	20

TABLE OF AUTHORITIES (Continued)

	Page
Daye v. Commonwealth of Pennsylvania, 344 F.Supp. 1337 (E.D. Pa., 1972), aff'd 483 F.2d 294 (3d Cir., 1973), cert. denied sub nom. Meyers v. Commonwealth of Pennsylvania, 416 U.S. 946, 94 S.Ct. 1956 (1974)	20
Desert Outdoor Advertising, Inc. v. County of San Bernardino, No. 144, October 1968 Term, U. S. Supreme Court, 37 U.S.L.W. 3016 (1968)	15, 19
Desert Outdoor Advertising, Inc. v. County of San Bernardino, 393 U.S. 8, 89 S.Ct. 45 (1968)	14
Desert Outdoor Advertising, Inc v. County of San Bernardino, 255 Cal.App.2d 765, 63 Cal.Rptr. 543 (1967) .	14
Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313 (1970) .	22,23
Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 2289 (1975)	18
Mahler v. United States, 306 F.2d 713 (3d Cir., 1962) . .	20

TABLE OF AUTHORITIES (Continued)

	Page
Markham Advertising Co., Inc. v. Washington, 393 U.S. 316, 89 S.Ct. 553, rehearing denied, 393 U.S. 1112, 89 S.Ct. 854 (1969)	17,18,19
Markham Advertising Company v. State, 439 P.2d 248 . . .	15,16,17
Martens v. Winder, 191 Cal. App.2d 143 (1961)	22
People ex rel. Dept. Pub. Wks. v. Adco Advertisers, 35 Cal.App.3d 507 (1973) . .	4,12,13
State of Vermont v. Brinegar, 379 F.Supp. 606 (1974) . . .	2,19

CODES

California Business and Professions Code:	
Section 5200, et seq.	4,10
Section 5410	6
Section 5412	4,10,11,12
California Code of Civil Procedure:	
Section 437(c)	22

TABLE OF AUTHORITIES (Continued)

FEDERAL STATUTES

	Page
Title 23 United States Code:	
Section 109	20
Section 131	2,3,10, 19,24
Section 131(b)	4,19
Section 145	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1773

DESERT OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Transportation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

Respondent prays that the Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, be denied.

QUESTIONS PRESENTED

The questions presented as stated on pages 2 and 3 of the Petition herein are totally incorrect and misleading insofar as they do not relate to the issues raised and litigated in the State court proceeding. The removal of Petitioner's billboards is required by State law, not federal law, and the procedure for paying just compensation is set forth exclusively in State law. The Federal-aid highway program is a "federally assisted State program", and 23 U.S.C. 131 and 145 only establish minimum standards for State control of billboards. As was made clear by the decision in State of Vermont v. Brinegar, 379 F.Supp. 606 (1974), the requirements of federal law for control of billboards and payment of compensation are only conditions for payment to the State of federal highway funds. Thus,

contrary to the Petition filed herein, there cannot be any issues raised herein by Petitioner with respect to compliance with 23 U.S.C. 131. The only question legitimately presented is whether or not State law provisions which allow for payment of just compensation after removal violate Petitioner's constitutional rights.

STATEMENT OF THE CASE

On July 31, 1973, Respondent The People of the State of California, acting by and through the Department of Transportation, filed a complaint in the Superior Court for Riverside County, State of California, in which the State sought an injunction compelling removal of 52 billboards owned by Desert Outdoor Advertising, Inc., and a declaratory judgment declaring that the billboards could be removed without payment of just compensation. The State's action was

predicated solely upon State law as contained in the California Outdoor Advertising Act (Bus. & Prof. Code § 5200, et seq.).

At the time the State filed its complaint in Riverside County, State law (California Bus. & Prof. Code § 5412) provided that just compensation was required only upon removal of billboards which were "lawfully in existence on October 22, 1965". As to billboards which were constructed after October 22, 1965, or which were constructed prior to October 22, 1965 but which existed in violation of law on that date, the State could require removal without payment of just compensation (People ex rel. Dept. Pub. Wks. v. Adco Advertisers, 35 Cal. App.3d 507 (1973)) without fear of incurring the penalty provisions contained in the Federal Highway Beautification Act of 1965 (23 U.S.C. 131(b)).

The contention of the State of California at the time it filed its complaint was that each of the billboards owned by Desert Outdoor existed in violation of Riverside County Ordinance No. 348 on October 22, 1965, and for that reason the State of California was not required to pay just compensation. Subsequent to the filing of the complaint by the State, in an unrelated action, Riverside County Ordinance No. 348 was declared unconstitutional by the Court of Appeal for the Fourth Appellate District in the State of California. Thereafter, the State of California abandoned its contention that it was not required to pay just compensation, and expressly admitted its obligation to pay compensation upon the removal of the billboards owned by Desert Outdoor.

California Business and Professions Code Section 5410 provided that any billboard located within 660 feet of the edge of the right of way of, and the copy of which was visible from, a penalty segment, which was lawfully maintained in existence on November 8, 1967 but which was not on that date in conformity with the provisions of the Outdoor Advertising Act, would not be required to be removed until July 1, 1970. In the course of the litigation in Riverside County, Petitioner herein expressly admitted that each of its billboards was not in conformity with the provisions of the Outdoor Advertising Act on November 8, 1967.

As a result of the admissions of Petitioner, a summary judgment was entered by the Riverside County Superior Court which ordered Petitioner to remove its nonconforming billboards and which

established Petitioner's right to payment of compensation "upon the removal of said outdoor advertising displays".

At the hearing of Respondent State of California's motion for summary judgment, Petitioner argued "that no removals could properly be ordered until just compensation was first paid". The same argument was urged on appeal. The appellate court summarized the case as follows:

> "A summary judgment was entered which ordered the defendants [Desert Outdoor Advertising, Inc.] to remove nonconforming billboards and established defendants' right to payment of compensation after the billboards were removed. Each of the billboards was nonconforming and subject to removal. The

respondent [State of California] concedes that the defendants are entitled to payment of compensation for the removal of these billboards."

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, Appendix A, pp. A-1 and A-2.

The appellate court did not accept Petitioner's argument that payment of just compensation was required <u>prior</u> to removal, and held as follows:

"Defendants, nevertheless, contend that they have a constitutional right to payment of compensation prior to the removal of the billboards. Their argument in this respect comes under an

eminent domain rationale. They do have the right to payment, under Business & Professions Code, § 5412, which provides that the owner of such advertising shall be paid 'just compensation.' Sections 5413 and 5414, <u>supra</u>, provide for the procedure for obtaining such payment. Since there is no constitutional right to payment before removal, the administrative and judicial procedure established by those sections appears fair and reasonable."

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, Appendix A, pp. A-4 and A-5.

REASONS FOR DENYING THE WRIT

I

THE STATE COURT JUDGMENT DID NOT DECIDE A SUBSTANTIAL FEDERAL QUESTION

The judgment requiring Petitioner Desert Outdoor Advertising, Inc., to remove its billboards was based solely upon provisions of the California Outdoor Advertising Act (California Bus. & Prof. Code § 5200, et seq.). The Outdoor Advertising Act regulates the placing and maintenance of billboards adjacent to almost all California State highways, and is a regulatory act based on the police power. Nowhere in the Outdoor Advertising Act is the State of California given legislative authority to exercise the power of eminent domain for the purpose of taking billboards. Quite to the contrary, in Section 5412 of the California

Business and Professions Code, which provides for payment of compensation upon removal of certain billboards, the Legislature unequivocally states that it does not intend to relinquish its powers under the police power.

> "If federal law requires the states to pay just compensation with regard to the removal of any advertising display, the owner or owners of such advertising display and the owner or owners of the land upon which such display is located, shall be paid just compensation. The sole intent of the Legislature in enacting this section is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers

relating to the removal of advertising displays under the police power." (Emphasis added.)

California Business and Professions Code Section 5412.

That the removal of the billboard herein is required by a valid police power regulation, and is not an eminent domain taking, was expressly recognized by the Court of Appeal for the State of California in People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra, and by the Court of Appeal.

> "The removal provisions of the Outdoor Advertising Act are a valid exercise of the police power of the state, not a taking under the power of eminent domain. In considering the Outdoor Advertising Act, the court in Adco

pointed out that the Act constituted a valid exercise of the police power of the state and said, '"Regulations regarding and restrictions upon the use of property in an exercise of the police power for an authorized purpose, do not constitute the taking of property without compensation or give rise to constitutional cause for complaint."'" (Emphasis added.)

People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra, at p. 512; Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, Appendix A, pp. A-3 and A-4.

In the case of Desert Outdoor Advertising, Inc. v. County of San Bernardino, 255 Cal.App.2d 765, 63 Cal. Rptr. 543 (1967), the Petitioner herein sued the County of San Bernardino to enjoin enforcement of a county ordinance which prohibited billboards along certain freeways. In a consolidated action the County sought to abate as nuisances two billboards which violated the ordinance. Judgment was entered for the County, and on appeal it was held that the ordinance was a proper exercise of the police power. Desert Outdoor petitioned the United States Supreme Court for a hearing, and the appeal was dismissed for want of a substantial federal question (Desert Outdoor Advertising, Inc. v. County of San Bernardino, 393 U.S. 8, 89 S.Ct. 45 (1968)). The questions presented on appeal were:

(1) Can county, consistent with the Fourteenth Amendment, pass zoning ordinance requiring removal of preexisting bill-boards without payment of just compensation?

(2) Is such ordinance repugnant to Federal Highway Beautification Act, which requires payment of compensation for such removal?

(3) Can zoning ordinances based primarily or entirely on aesthetic grounds require removal of preexisting bill-boards?

See questions presented, Notice of Appeal, Desert Outdoor Advertising, Inc. v. County of San Bernardino, No. 144, October 1968 Term, U. S. Supreme Court, 37 U.S.L.W. 3016 (1968).

In the case of Markham Advertising

Company v. State, 439 P.2d 248, a number of billboard companies brought an action seeking a declaration that the Washington Highway Advertising Control Act of 1961 was unconstitutional. This state law was enacted to conform to the requirements of Pub. L. No. 85-767, ch. 1, sec. 131, 72 Stats. 904, formerly 23 U.S.C. 131. The plaintiffs also raised issues with respect to the 1965 Federal Highway Beautification Act, 23 U.S.C. 131. The state law in question required removal of nonconforming billboards adjacent to interstate highways after an amortization period, without payment of compensation.

The Washington Supreme Court held that the act being challenged was a valid exercise of the police power. Plaintiffs in Markham also claimed a denial of rights under the United States Constitution.

"Plaintiffs further contend that the Act deprives them of due process of law because it authorizes the taking of their property without compensation. U.S. Const. amend. 14; Const. art. 1, § 3. When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention. Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721 (1914); ..."

Markham Advertising Company v. State, supra, at p. 261.

On appeal to the United States Supreme Court, the appeal was dismissed for want of a substantial federal question (Markham Advertising Co., Inc. v.

Washington, 393 U.S. 316, 89 S.Ct. 553, rehearing denied, 393 U.S. 1112, 89 S.Ct. 854 (1969)).

In both the Desert and Markham cases the United States Supreme Court action, in dismissing for want of a substantial federal question, constituted a dismissal on the merits of the case (Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 2289 (1975)).

In a recent case, Art Neon Co. v. City and County of Denver, 488 F.2d 118 (1973), the court held that a legislative determination concerning termination of a billboard use must only meet the test of reasonableness, and it is not required that owners affected receive compensation. The court stated that an ordinance regulating billboards was within the police power, and not within the just compensation requirements under the power of

eminent domain (Art Neon Co. v. City and County of Denver, supra, at p. 123).

It is beyond dispute that Petitioner has no constitutional right to payment of compensation (Desert Outdoor Advertising, Inc. v. County of San Bernardino, supra; Markham Advertising Co., Inc. v. Washington, supra), and as demonstrated by the holding in State of Vermont v. Brinegar, supra, there is no right to payment of compensation under federal law because the State of California is free to deny compensation and accept the 10 percent penalty provided by 23 U.S.C. 131(b). 23 U.S.C. 131 creates rights and obligations between the states and the federal government, but clearly creates no rights in individuals affected by state laws enacted pursuant to the federal inducement. When a state chooses to accept the federal inducement, a

contractual relationship is established between the state and federal government (23 U.S.C. 109) which does not create new rights in the citizens of the state. See D.C. Federation of Civil Association, Inc. v. Airis, 129 U.S. App. D.C. 125, 391 F.2d 478 (1968); Mahler v. United States, 306 F.2d 713 (3d Cir., 1962); Daye v. Commonwealth of Pennsylvania, 344 F.Supp. 1337 (E.D. Pa., 1972), aff'd 483 F.2d 294 (3d Cir., 1973), cert. denied sub nom. Meyers v. Commonwealth of Pennsylvania, 416 U.S. 946, 94 S.Ct. 1956 (1974).

Based upon the foregoing, the conclusion is inescapable that since Petitioner's billboards could constitutionally be removed without payment of any compensation whatsoever, the billboards may constitutionally be removed prior to the payment of compensation. It is equally

clear that Petitioner has no rights under 23 U.S.C. 131.

II

THE SUMMARY JUDGMENT WAS A DETERMINATION ON THE MERITS AND PETITIONER WAS NOT DENIED DUE PROCESS OF LAW

Petitioner has taken the incredible position that "Since the judgment herein is a summary judgment, no trial on the merits was held...." (Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, at p. 10). Petitioner argues that "It is elemental to the concept of due process of law that a party be given an opportunity to present its case before a judgment can be entered against it...." and that it was a "victim" of a summary judgment (Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, at pp. 15-16).

California law clearly provides that

a summary judgment is a result of a determination that there is no triable issue of fact and is a judgment on the merits (Martens v. Winder, 191 Cal.App. 2d 143 (1961), C.C.P. § 437(c)).

Federal law is equally clear that a summary judgment is a judgment on the merits. In Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313 (1970), it was argued that a summary judgment could not have any collateral estoppel effect because it was not a judgment on the merits. The court had little trouble disposing of such a "beguiling but superficial contention".

> "It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero.

> It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence--plaintiff's, defendant's, or all--of a directed verdict. Indeed, a more positive adjudication is hard to imagine. It is determination that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' F.R.Civ.P. 56(c)...." (Emphasis added.)

Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., supra, at p. 1319.

CONCLUSION

The authorities cited herein clearly establish the following:

1. The judgment requiring removal of Petitioner's billboards was based solely on State law.
2. Removal of Petitioner's billboards is accomplished exclusively under the police power, not the power of eminent domain.
3. Billboards may be removed under California law pursuant to the police power without payment of any compensation whatsoever.
4. Removal of billboards under the police power without payment of compensation is constitutional and does not raise a substantial federal question.
5. Petitioner has no rights under 23 U.S.C. 131.

Because Petitioner's constitutional rights have not been violated, and because Petitioner has no rights under federal law, Petitioner has not raised a substantial federal question and the Petition herein should be denied.

DATED: July 1, 1976.

Respectfully Submitted,

HARRY S. FENTON, Chief Counsel
EMERSON RHYNER, Deputy Chief Counsel
STEPHEN A. MASON, RONALD W. BEALS

By
STEPHEN A. MASON

Attorneys for Respondent
State of California